



No. **78-1687**

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

ALAN J. WHITE,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT,

JOYCE L. EVANS, Individually and
as Acting Director, Office of
Administrative Law Judges, and

EDWARD A. SCHROER, Individually and
as Director, Office of Management,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATUTORY AND REGULATORY APPENDIX

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, Md. 20854

Petitioner,
in propria persona

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§ 552a. Records maintained on individuals

(a) Definitions.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

* * *

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

* * *

(g)(1) Civil remedies.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

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(k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the

disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

* * *

PART 297

PROTECTION OF PRIVACY IN PERSONNEL RECORDS

SUBPART A--RECORDS MAINTAINED ON INDIVIDUALS

297.101 Purpose.

The purpose of this part is to set forth the basic policies of the Commission on protection of individual privacy in regard to personnel records and files maintained within the Federal Government. This part applies to any department and independent establishment established in the executive branch of the Federal Government, including a Government corporation or Government controlled corporation, except the Central Intelligence Agency and the Federal Bureau of Investigation.

* * *

297.104 Uses of information.

Agencies shall ensure that individuals from whom information is collected about themselves are informed of the reasons for requesting the information, how it may be used, and what the consequences are, if any, of not providing the information. As a minimum, the individual should be given the following information in language which is explicit and easily understood and not so lengthy as to deter an individual from reading it:

(a) Cite the specific provisions of the statute or Executive Order, including a brief title or subject, which authorizes the agency to collect the personal information it is requesting.

Inform the individual whether or not a response is mandatory or voluntary and the possible consequences of failing to respond.

(b) Cite the general purposes for which the information will be used by the agency which maintains it.

(c) Cite the special routine uses for which the information will be employed. This may be a summary of the information published in the public notice under section 293.103 of this chapter.

(d) Cite the effects on the individual, if any, of not providing any or all of the information requested.

* * *

297.111 Request for correction or amendment of record.

(a) Any individual may submit a request for correction of or amendment to a record that pertains to him or her to the Commission or an agency. The request should be made either in person or by mail to the System Manager or his designee indicated in the notice of systems of records.

(b) The processing of requests submitted by mail will be facilitated if the words "PRIVACY ACT REQUEST" appear in capital letters on the face of the envelope, and the letter of inquiry.

(c) Any request which is not addressed as specified in paragraph (a) of this section or which is not marked as specified in paragraph (b) of this section will be so addressed and marked by Commission or agency personnel and forwarded

immediately to the responsible System Manager. A request not properly addressed by the individual will not be deemed to have been "received" for purposes of measuring time periods for response until the responsible System Manager receives it. In each instance when a request so forwarded is received, the System Manager or his designee shall notify the individual that his or her request was improperly addressed and the date when the request was received at the proper address.

(d) Since the request for correction or amendment normally will follow a request for access under section 297.108, the individual's identity will be established by his or her signature on the request.

(e) A request for correction or amendment should include the following:

(1) The specific identification of the record sought to be corrected or amended (for example, description, title, date, paragraph, sentence, line, and words);

(2) The specific wording to be deleted, if any;

(3) The specific wording to be inserted or added, if any, and the exact place at which it is to be inserted or added; and

(4) A statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement.

(f) The provisions of section 297.106(d)(2) and (3) apply to the information obtained under paragraph (e) of this section.

297.112 Review of request for correction or amendment of record.

(a)(1) Not later than 10 days (excluding Saturdays, Sundays, and holidays) after receipt of a request to correct or amend a record, the System Manager or his designee shall send an acknowledgement providing an estimate of time within which action will be taken on the request. If a response cannot be made within 10 days due to unusual circumstances, the System Manager shall send an acknowledgement during that period providing information on the status of the request and asking for such further information as may be necessary to process the request. Unusual circumstances shall include circumstances where a search for and collection of requested records from storage, field facilities or other establishments are required, cases where a voluminous amount of data is involved, or instances where information on other individuals must be separated or deleted from the particular record. No acknowledgement will be sent if the request can be reviewed, processed, and the individual notified of the results of review (either compliance or denial) within the 10 days. Requests filed in writing will be acknowledged in writing at the time submitted.

(2) Promptly after acknowledging receipt of a request, or after receiving such information as might have been requested, or after arriving at a decision in 10 days, the System Manager or his designee shall either:

(i) Make the requested correction or amendment and advise the individual in writing of such action, providing either a copy of the corrected or amended record or a statement as to the means whereby the correction or amendment was effected in cases where a copy cannot be provided

(for example, erasure of information from a record maintained only in an electronic data bank); or

(ii) Inform the individual in writing that his or her request is denied and provide the following information:

(A) The System Manager's or his designee's name and title or position;

(B) The date of the denial;

(C) The reasons for denial, including citation of the appropriate sections of the Act and this part; and

(D) The procedures for review of the denial as set forth in section 297.113, including the name and address of the Director, Bureau of Manpower Information Systems, or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate. The term "promptly" in this paragraph means within 30 days (excluding Saturdays, Sundays, and holidays). If the System Manager or his designee cannot make the determination in 30 days, the individual will be advised in writing of the reasons therefor and of the estimated date by which the determination will be made.

(b) Whenever an individual's record is corrected or amended pursuant to a request by that individual, the System Manager or his designee shall notify all persons and agencies to which the corrected or amended portion of the record had been disclosed prior to its correction or amendment, if an accounting of such disclosure required by the Act was made. The notification shall require a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record, and to apprise

any agency or person to which it had disclosed the record of the substance of the correction or amendment. This requirement does not apply to disclosures made pursuant to paragraphs (a) or (b) of section 297.109 of this part.

(c) The following criteria are examples of those that will be considered by the System Manager or his designee in reviewing a request for correction or amendment:

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in terms of the purpose for which it was collected;

(4) The timeliness and currency of the information in light of the purpose for which it was collected;

(5) The completeness of the information in terms of the purpose for which it was collected;

(6) The degree of possibility that denial of the request could unfairly result in determinations adverse to the individual;

(7) The character of the record sought to be corrected or amended; and

(8) The propriety and feasibility of complying with specific means of correction or amendment requested by the individual.

(d) The Commission or the agency will not make an effort to gather evidence for the individual, but does reserve the right to verify the evidence which the individual submits.

(e) Correction or amendment of a record requested by an individual will be denied upon a determination by the System Manager that:

(1) The information submitted by the individual is not accurate or relevant;

(2) The correction or amendment would violate an enacted statute or regulation; or

(3) The individual refuses to provide information which is necessary to process the request to correct or amend the record.

(f) If a request is partially granted and partially denied, the System Manager shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

(g) When an agency detects erroneous data in an individual's personnel records or a third party source provides corrected information, it shall correct the record and provide all recipients of such record with the corrected information to the extent that it is relevant to the recipient's uses and deemed feasible to do so.

297.113 Review of initial adverse determination on correction or amendment.

(a) When a request for correction or amendment has been denied initially under section 297.112, the individual may submit a written appeal within 30 days after the date of the initial denial.

* * *

(c) The individual's request papers shall include the following:

a copy of the original request for correction or amendment; a copy of the initial denial; and a statement of the reasons why the initial denial is believed to be in error. The request shall be signed by the individual. The record that the individual requests be corrected or amended will be supplied by the System Manager who issued the initial denial. While the foregoing normally will comprise the entire record on request, the System Manager may seek additional information necessary to assure that the final determination is fair and equitable and, in such instances, the additional information will be disclosed to the individual to the greatest extent possible and an opportunity provided for comment thereon.

(d) The Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall act upon the request and issue a final determination in writing not later than 30 days (excluding Saturdays, Sundays, and holidays) from the date on which the appeal is received; provided that the Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, may extend the 30 days upon deciding that a fair and equitable review cannot be made within that period, but only if the individual is advised in writing of the reason for the extension and the estimated date by which a final determination will be issued (estimated date should not be later than the 60th day excluding Saturdays, Sundays, and holidays after receipt of appeal unless unusual circumstances, as described in section 297.112(a)(1) are met).

(e) If a request is determined in favor of the individual, the final determination shall include the specific corrections or amendments to be made. A copy thereof shall be transmitted promptly both to the individual and to the System Manager who issued the initial denial. Upon receipt of such final determination, the System Manager promptly shall take the actions set forth in section 297.112(b).

(f) If the request is denied, the final determination shall be transmitted promptly to the individual and state the reasons for the denial. The notice of final determination also shall inform the individual of the following information:

(1) The right of the individual to file a concise statement of reasons for disagreeing with the final determination. Such a statement shall be filed with the Director, Bureau of Manpower Information Systems, U.S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415, or with the Assistant Executive Director for Freedom of Information and Privacy, U.S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415, as appropriate. It should identify the date of the final determination and be signed by the individual. The Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall acknowledge receipt of such statement and inform the individual of the date it was received;

(2) The fact that any such disagreement statement filed by the individual will be noted in the disputed record and that a copy of the statement will be provided to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(3) The fact that the Commission will append to any such disagreement statement filed by the individual, a copy of the final determination or summary thereof which also will be provided to persons and agencies to which the disagreement statement is disclosed; and

(4) The right of the individual to judicial review of the final determination under 5 U.S.C. 552a(g)(1)(A), as limited by 5 U.S.C. 552a(g)(5).

(g) In making the final determination, the Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall use the criteria set forth in section 297.112(c) of this subpart and shall deny an appeal only on the grounds set forth in 297.112(e).

(h) If an appeal is partially granted and partially denied, the Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

(i) Although a copy of the final determination or a summary thereof will be treated as part of the individual's record for purposes of disclosure in instances where the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(j) The provisions of section 297.106(d)(2) and (3) apply to the information obtained under paragraphs (c) and (g)(1) of this section.

* * *

297.117 Specific exemptions.

* * *

(b) The specific exemptions determined to be necessary and proper with respect to systems of records maintained by the Commission or an agency for the Commission, including the reasons and parts of each system to be exempted, the provisions of the Act from which they are exempted, and the justifications for the exemptions, are as follows:

* * *

(1) Personnel Investigations Records.

All information about an individual in the records that meets the criteria stated in 5 U.S.C. 552a-(k)(1), (2), (5), and (6) are exempt from the requirements of 5 U.S.C. 552a(c)(3) and (d) relating to access and contest and making an accounting of disclosure to the individual named in the record for the following reasons:

* * *

(iii) In that a personnel investigation can involve information obtained from a source who furnished such information under a properly granted promise that the identity of the source would be held in confidence the application of exemption (k)(5) will be required to honor such a promise should the individual request access to the record under subsection (d). . . .

* * *